In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-588

STANLEY JERRY PIASCIK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Stanley Jerry Piascik hereby petitions this Court for a writ of certiorari to review the decision of the Ninth Circuit in the appeal entitled *"United States of America, Plaintiff-Appellee, v. Stanley Jerry Piascik, Defendant-Appellant"* (No. 76-3028, August 18, 1977) and on petition for rehearing (petition filed September 1, 1977; denied September 22, 1977). The decisions and orders of the Ninth Circuit Court of Appeals affirming the judgment of the United States District Court for the

Western District of Washington, and denying a rehearing, are appended hereto in accordance with Rule 23(1)(i) of the Supreme Court Rules.

I. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Ninth Circuit Court of Appeals filed its decision affirming the judgment of the United States District Court for the Western District of Washington on August 18, 1977. Pursuant to Rule 40(a) of the Rules of Appellate Procedure,[1] petitioner timely filed a petition for rehearing on September 1, 1977. Said petition was denied on September 22, 1977.

The legal effect of a timely petition for rehearing is to stay the time for petitioning for certiorari until thirty days from the date of the order denying a rehearing, Supreme Court Rule 22(2), *United States v. Healy*, 376 U.S. 75, 78, 84 S.Ct. 553, 11 L.Ed.2d 527, 531 (1964).[2] Consequently, this petition is timely

[1]Appellate Rule 40(a) provides: A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

[2]*See*, also, Stern and Grossman, *Supreme Court Practice* (3rd Ed. 1962), Section 6.3 at 205.

filed. Moreover the time limitation is not jurisdictional. *Taglianetti v. U.S.*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969).

The jurisdiction of this Court is invoked in accordance with 28 USC Sec. 1254, which provides in relevant part,

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

II. QUESTIONS PRESENTED FOR REVIEW

1. Whether failure to abide by the recording requirement of 28 USC Sec. 753(b) in a criminal case constitutes reversible error.

2. Whether the recording requirement of 28 USC Sec. 753(b) may be waived in criminal cases.

3. Whether, when appellate counsel does not discover until the trial court has lost jurisdiction that the proceedings were incompletely recorded, it is proper for the Court of Appeals to refuse to remand for reconstruction of the record.

4. Whether a new trial is required when the prosecutor in closing argument refers to a handwriting analysis not in evidence and falsely implies that the analysis establishes the defendant's guilt.

5. Whether it is plain error for the jury instructions in a criminal case to include definition of a

term, the meaning of which to the defendant was a critical factual issue.

6. Whether there is merger or other error when a defendant is charged with failure to declare an article to a customs official and smuggling that article, and the only act of concealment with respect to smuggling which is alleged or proven is failure to declare the article.

III. STATUTORY AND CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES

28 USC Section 753(b) provides:

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.
>
> The reporter shall attach his official certificate to the original shorthand notes or other original

> records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

18 USC Section 542 provides:

> *Entry of goods by means of false statements*
>
> Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or
>
> Whoever is guilty of any willful act or omission where the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—
>
> Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

18 USC Section 545 provides:

Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the

the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

IV. STATEMENT OF THE CASE[2]

Petitioner Stanley Piascik was indicted on January 20, 1976, on a three-count indictment for allegedly importing a stolen Mercedes Benz. The first count alleged that he smuggled the automobile into the United States in violation of 18 USC Sec. 545. The second count alleged that in bringing the automobile across the border from Canada he failed to declare the Mercedes in violation of 18 USC Sec. 542. The third count charged Piascik with transportation of stolen property (namely, the Mercedes) in foreign commerce. After a jury trial in the District Court in Seattle, petitioner was convicted on all counts. The appealed from his conviction as to each count, and the Ninth Circuit affirmed. The propriety of that decision is at issue here.

The petitioner is a naturalized American citizen. He was born in Warsaw in 1940, and did not leave Poland until 1964, or become an American citizen until 1968 (T 207). At the time of trial he taught finance at Sonoma State College (T 212:24) and was a doctoral candidate at Golden Gate University (T 213:21).

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[2]T refers to the reporter's transcript; AT refers to the augmented reporter's transcript.

Many of the facts are not in dispute. Piascik admitted at trial having purchased the passport of one Edwin Middleswart for the purpose of returning to Poland under an assumed name to visit his family (T 225-229). He admitted having brought the Mercedes into this country while identifying himself as Middleswart (T 256-257). He admitted having loaned the Middleswart passport to one Bela Kovacs, who owed him $2500 (T 219, 233).

Kovacs testified on deposition that in collaboration with one Richard Meissner he rented the Mercedes from a car rental agency using Middleswart's passport and did not return it (T 427-433). He further testified that Piascik knew nothing of the use to which Middleswart's passport was put (T 429-430); that Piascik had not been told that the car was rented (T 457); that Meissner forged a bill of sale and other documents establishing his right to the car (T 437); that Piascik had been told that the car had been owned by a United States citizen, was registered in New York and would require no duties (T 444); and that Kovacs and Meissner had not intended to involve Piascik in any illegality but only to use him (T 461).

Petitioner was represented at trial by one Alan Froelich, of Seattle, and has been represented on appeal by Ephraim Margolin, his present attorney. Upon taking the case, present counsel requested a full transcript; that transcript omitted final arguments of counsel but did not state that final arguments were unrecorded. Assuming that final arguments were in

fact recorded, counsel requested an augmented transcript, which contained the following exchange:

> The Court: Now Mr. Mair and Mr. Froelich, do you both agree to waive the reporting of your closing statements?
>
> Mr. Froelich: The defense does.
>
> Mr. Mair: I do.
>
> The Court: Very well.
>
> (AT 554-5)

Counsel inquired as to the content of closing argument and was informed for the first time of improprieties on the part of the U. S. Attorney in making his closing argument. It was disclosed that the U. S. Attorney, as alleged in affidavits submitted to the Court of Appeals in support of petitioner's motion to augment the record and in relation to a supplemental opening brief on appeal, alluded to a handwriting analysis not in evidence and stated:

> There are a lot of fraudulent written documents which you will see among the exhibits. A handwriting expert analyzed them and compared them with the handwriting samples of the accused. I have the expert's letter here. What does he say about the handwriting of Mr. Piascik, who claims he is innocent? . . . Well, let's do it hypothetically. What if a handwriting expert said that he cannot exclude someone as the author of some forged documents even though that someone may have made an effort to disguise his handwriting during the sample taking! But if you want to find him innocent that's your privilege.

On the basis of the inadequate record and apparent prosecutorial misconduct, petitioner requested reversal

and, in the alternative, remand to the District Court for reconstruction of the record.[4]

The jury instructions included a definition of "acquired": "The verb 'acquired' means to come into possession, control or power of disposal."[5] Central to the petitioner's defense at trial was that his understanding of the sense in which the verb was being used was different from the customs' officials (T 111:13-20, 267:8-17, 295:12-18, 296:5-16). The jury instruction took that defense away from the petitioner.

V. ARGUMENT

A. FAILURE TO ABIDE BY THE COURT REPORTER ACT WAS REVERSIBLE ERROR OR REQUIRED REMAND ON THE FACTS OF THIS CASE.

The circuits are divided as to the circumstances in which failure to abide by the Court Reporter Act in criminal cases calls for reversal. In *Parrott v. United States,* 314 F.2d 46, 47 (10 Cir. 1963) it was held that where an error was claimed in voir dire examination, reversal was required because "The unavailability of a full transcript makes it impossible for us to determine whether the errors were harmless . . ." Similarly, the Fifth Circuit has taken the position that

> [T]he Court must be able to say affirmatively that no substantial rights of the appellant were adversely affected by the omissions from the transcript; that is, it must exclude the possibility of any error other than harmless error.

---

[4] *See, e.g.,* appellant's closing brief at 8.

[5] Instruction No. 12.

United States v. Upshaw, 448 F.2d 1218, 1224 (5 Cir. 1971).

The Ninth Circuit is unique in not automatically reversing in such cases but rather remanding "to determine whether the appellant was prejudiced by the error in failing to record the arguments," *Brown v. United States,* 314 F.2d 293 (9 Cir. 1963). The facts in the present case are more pressing than those in *Brown,* because in the latter case appellate counsel did not assert any particular unrecorded error. In the present case a particular unrecorded error *was* asserted, and "it is impossible to determine whether the error [was] harmless . . ." *Parrott, supra.* Nonetheless the Ninth Circuit affirmed. Reversal and in the alternative, remand, were requested, but both were denied.

The Ninth Circuit here asserts that waiver of the requirements of the Court Reporting Act in criminal cases is possible, and by implication asserts that such a waiver acts also as a waiver of the right to appeal unrecorded errors. Both assertions are at odds with the weight of authority in this Court and circuits other than the Ninth.

The statute is explicit that recording of arguments in criminal cases *cannot* be waived. The statute provides for recording of

> (1) all proceedings in criminal cases had in open court; [and] (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary . . .

The obvious intent of the language is to prohibit waiver in criminal cases but to permit it in civil cases, and the history is in accord.

As of 1939, there was no general federal court reporting system. The Judicial Conference in that year referred the matter of court reporters to the Director of the Administrative Office of the Courts, who reported back in 1940.[6] The Judicial Conference of 1940 appointed a committee of judges to explore the matter of appointed reporters.[7] The committee report recommended legislation establishing an official court reporting system, including among its provisions "That the official court reporter is to record all proceedings in criminal cases had in open court and all proceedings in other cases unless the parties specifically agree to the contrary."[8] The Judicial Conference's recommendations were enacted in 1944 in legislation much in the same form,[9] and the Director of the Administrative Office of the Courts reported in particular that the new legislation

> will avoid the uncertainty that now exists in *habeas corpus* proceedings, brought by convicted defendants, as to what really happened at the arraignment, on the hearing, or at the time of sentence.[10]

[6]Judicial Council Report of 1940, at 9.

[7]*Id.*

[8]Report of the Judicial Conference, 1941, at 7.

[9]58 Stats. 5-7.

[10]Chandler, "Some Major Advances in the Federal Judicial System, 1922-47," 31 F.R.D. 307, 440.

Evidently the distinction between civil and criminal cases in that challenges in criminal cases are frequently brought years after a decision, was in the minds of the draftsmen in drafting the Court Reporter Act. Given the uncertainties as to what the defendant is waiving and what the law may be in the future in the criminal area, it makes obvious sense to insure a record in criminal cases regardless of the wishes of the defendant.

That is clearly the basis of those decisions which have concluded that the provisions of the Court Reporter Act are mandatory rather than directory. As was said in *Parrott, supra,* "A local rule or practice cannot override a statute of the United States." 314 F.2d at 47. Yet that is precisely what has been done in the present case. Even the Ninth Circuit agrees that "Local practice cannot alter the statute,"[11] and "condemn[s] the procedure"[12] employed by the Western District of Washington.

Even if waiver of reporting were possible,[13] a waiver of reporting is not a waiver of the right to contest unreported errors. The petitioner still has the right

[11]Slip opinion, at 1899.

[12]*Id.*, Note 9 at 1899.

[13]The Ninth Circuit cites three cases, none of which are *en pointe*. *United States v. Murray,* 352 F.2d 397 (4 Cir. 1965) avoided the issue presented by this case by determining that a parking violation is not a criminal case within the meaning of the Court Reporter Act. *Addison v. United States,* 317 F.2d 808 (5 Cir. 1963) was decided on the basis of lack of any alleged unrecorded errors, and not even the existence of a record of waiver was established. In *United States v. Sigal,* 341 F.2d 837 (3 Cir. 1965) there was a waiver of errors rather than a mere waiver of recording, so that failure to record was harmless error.

recognized in *Upshaw* and *Parrott, supra,* to a determination whether all errors were harmless. For that to be accomplished, there is no other available remedy than remand for Appellate Rule 10(c) hearing in accordance with the Ninth Circuit's own holding in *Brown v. United States,* 314 F.2d 293 (9 Cir. 1963). Absent a waiver of errors as opposed to a waiver of recording, remand was required in this case.

The statement of the prosecutor during final argument was clear misconduct;[14] petitioner therefore had the right to reversal or at least remand to obtain a clear record in that respect.

B. INSTRUCTION NUMBER 12 WAS IMPROPER

Petitioner's conviction on Counts I and II was based upon his failure to state to customs officials that he had come into possession of the Mercedes in Canada.

Count II (18 USC Sec. 542) was based upon his negative answer to the question whether he had "acquired" anything in Canada. 18 USC Sec. 542 permits conviction of one who makes a false statement in a declaration "without reasonable cause to believe the truth of such statement." The petitioner's defense was, in essence, that he had reasonable cause to believe in the truth of his statement because of his understanding of the meaning of the word "acquire." (T 111:13-20, 267:8-17, 295:12-18, 296:5-16)

[14]*See, e.g., Berger v. U.S.,* 295 U.S. 78, 88, 79 L.Ed. 1314, 1321, 55 S.Ct. 629, 633 (1935), and *United States v. Martinez,* 514 F.2d 334 (9 Cir. 1975).

Count I (18 USC Sec. 545) was based upon the same facts. Introduction of goods "surreptitiously by concealment or fraud" has been deemed "clandestine introduction" within the meaning of 18 USC Sec. 545. *U.S. v. Kurfess,* 426 F.2d 1017, 1019 (7 Cir. 1970), *cert. denied* 400 U.S. 830, 91 S.Ct. 60, 27 L.Ed. 2d 60. There would be nothing surreptitious if the defendant answered customs officials truthfully as he understood the meaning of their questions. By instructing the jury with a definition of "acquire," the trial court deprived petitioner of his only defense, reducing the jury "to the position of a mere ministerial agent by a direction of their very thought, thereby withholding of a vital right due them." *Morris v. U.S.,* 156 F.2d 525, 529 (9 Cir. 1946).

The present case presents a conflict between circuits as to whether improper instructions constitute "plain error."[15] In view of *Screws v. U.S.,* 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495, the rule followed by the Ninth Circuit in the present case is clearly incorrect.

C. CONVICTION FOR VIOLATION OF BOTH 18 USC SEC. 542 AND 18 USC SEC. 545 WAS IMPROPER

On the facts of this case, the only "clandestine introduction" (18 USC Sec. 542) in this case was the alleged act of making a false declaration in violation of 18 USC Sec. 542. As a consequence, once proof of

[15]Compare *Barry v. U.S.,* 287 F.2d 340, 341 (D.C. Cir. 1961), holding that such errors "need not be overlooked by an appellate court because overlooked by counsel."

violation of Section 545 was made, no additional proof was required to establish the elements of Section 542. It is settled that failure to declare foreign merchandise is sufficient to establish the elements of "clandestine introduction" within the meaning of 18 USC Sec. 545. *United States v. Kurfess,* 426 F.2d 1017, 1019 (7 Cir. 1970) *cert. denied* 400 U.S. 830, 91 S.Ct. 60, 27 L.Ed.2d 60, so that the only difference between Sections 542 and 545 where failure to declare is alleged is an "intent to defraud the United States" under Section 545.

Conviction of both offenses runs afoul of the test of merger set forth in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932):

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each* provision requires proof of an additional fact which the other does not. (Emphasis added.)

The *Blockburger* test has been correctly applied in other circuits, *e.g., United States v. Benn,* 476 F.2d 1127, 1132 (D.C. Cir. 1973), but is incorrectly applied in the present case, the Ninth Circuit asserting that because Section 545 does not always require "proof of any false statement or that the defendant knew the statement was false . . ." (Slip opinion at 1900), no merger problem exists in this case. That application of *Blockburger* is at variance with interpretations in other circuits and is, it is submitted, incorrect.

VI. CONCLUSIONS

By reason of the error in failure to record closing arguments, petitioner has the right to reversal as to all counts of the indictment, or at least, in the alternative, to remand to the District Court for a determination as to whether that error was prejudicial.

By reason of plain error in Instruction Number 12, petitioner has the right to outright reversal as to all counts of the indictment.

By reason of the merger of Counts I and II, petitioner has the right to reversal of his conviction for violation of 18 USC Section 542, and remand for reconsideration of the sentence in light of the reversal.

Respectfully submitted,

EPHRAIM MARGOLIN,

Attorney for Petitioner,

Stanley Jerry Piascik.

Dated, October 19, 1977.

(Appendices Follow)

Appendices

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 76-3028

United States of America,
Plaintiff-Appellee,
vs.
Stanley Jerry Piascik,
Defendant-Appellant.

[Filed Sep. 22, 1977]

ORDER

Before: MERRILL and GOODWIN, Circuit Judges,
and HOFFMAN, District Judge

The motion of appellee to dismiss is denied.

Appellant's application for stay and petition for rehearing is denied.

Appendix B

United States Court of Appeals,
Ninth Circuit.

No. 76-3028.

United States of America,
Plaintiff-Appellee,
vs.
Stanley Jerry Piascik,
Defendant-Appellant.

[Aug. 18, 1977.]

Appeal from the United States District Court
for the Western District of Washington

Before: MERRILL and GOODWIN, Circuit Judges,
and HOFFMAN,* District Judge.

HOFFMAN, District Judge:

The principal issue on the appeal from the judgment following appellant's conviction by a jury on a three-count indictment charging (1) the entry of imported merchandise into this country by means of false statements, 18 U.S.C. § 542; (2) smuggling, 18 U.S.C. § 545; and (3) transporting in interstate or foreign commerce a stolen motor vehicle, 18 U.S.C.

*The Honorable Walter E. Hoffman, United States Senior District Judge, Eastern District of Virginia, sitting by designation.

§ 2312, pertains to the action of the trial court in allowing the waiver[1] of the reporting of the closing arguments of counsel allegedly in violation of 28 U.S.C. § 753(b).[2]

When the evidence was concluded, and apparently in the presence of the jury,[3] the following colloquy took place.

"THE COURT: . . .
Now, Mr. Mair and Mr. Froelich, do you both agree to waive the reporting of your closing statements?
MR. FROELICH: The defense does.
MR. MAIR: I do.
THE COURT: Very well."

When the appeal was first noted the third issue presented was "whether the misconduct of the United States Attorney in closing argument requires reversal." An order was then entered directing that the closing arguments be transcribed. We were thereafter advised that the recording of the arguments had been waived by both counsel.

[1]Appellant procured new counsel following his conviction and sentence. The error is assigned by new counsel.

[2]Section 753(b) of Title 28, U.S.C., provides in pertinent part: "One of the reporters appointed for each such [district] court . . . shall record . . . verbatim . . . (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary . . . ."

[3]At argument before this Court inquiry was made whether the jury was present when the district judge suggested a waiver of the recording of closing arguments. Appellant's counsel stated that the jury was not present. The supplemental transcript indicates to the contrary.

No effort was made by appellant's counsel to comply with Rule 10(c), Federal Rules of Appellate Procedure[4] which obviously indicates that situations may arise where a transcript is unavailable. As a matter of custom and practice, unless requested by counsel for one of the parties, the record on appeal does not include such matters as the *voir dire* examination of jurors, and the opening and closing statements of counsel. In this case appellant's new counsel probably assumed that the closing arguments were recorded, but later ascertained that such was not the case.

In *Brown v. United States*, 314 F.2d 293 (9 Cir. 1963), Judge (now Chief Judge) Browning had occasion to consider the failure of the court reporter to record the closing arguments of counsel where no suggestion of prejudicial error was presented. His conclusion was—

> The appropriate procedure is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments. If the trial court concludes that he was, a new trial may be ordered. If the court concludes that he was not, a new final judgment may be entered.

[4]Rule 10(c), Federal Rules of Appellate Procedure, states:
"If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

Without a Rule 10(c) hearing in an effort to reconstruct the record as to the closing arguments, we are left with appellant's contention as to the alleged error. Appellant states that the prosecutor referred to a report of a handwriting expert which was not introduced in evidence either through the testimony of the expert or otherwise (the report was apparently inconclusive) and, upon objection, the court sustained the objection without a cautionary instruction, the latter apparently not having been requested. Appellant further urges that the misconduct of the prosecutor was so flagrant that a new trial is mandated. On the other hand, the Government argues that the recording of the closing arguments was waived and, additionally, appellant's trial counsel opened the door to comment on the authenticity of the many documents introduced in evidence. There is a dispute as to whether a mistrial was requested.

The requirements of 28 U.S.C. § 753(b) are mandatory according to several circuits and, we believe, from a fair reading of *Brown v. United States, supra,* they are mandatory in this circuit. We do not suggest that every word spoken during a criminal trial must be recorded as, for example, during a bench conference where neither party requests that the conference be recorded. We note, also, that the statute refers to procedings "in open court" which probably excludes the pre-charge discussions of court and counsel when in chambers. However, it seems clear that, irrespective of the local practice or rule, the opening and closing arguments of counsel are manifestly a part of the proceedings in a criminal case.

Under some authorities the failure to record closing arguments compels a reversal and new trial. *Fowler v. United States*, 310 F.2d 66 (5 Cir. 1962) (argument to jury); *Stephens v. United States*, 289 F.2d 308 (5 Cir. 1961) (*voir dire* and arguments to jury); *Parrott v. United States*, 314 F.2d 46 (10 Cir. 1963) (*voir dire* examination not recorded and trial judge mentioned that three other charges of bank robbery were pending against defendant). However, the Fifth Circuit may have modified its *Stephens* and *Fowler* reversal rule in *United States v. Upshaw*, 448 F.2d 1218, 1224 (5 Cir. 1971), saying:

> It seems to us that the court must be able to say affirmatively that no substantial rights of the appellant were adversely affected by the omissions from the transcript; that, it must exclude the possibility of any error other than harmless error.

The provisions of 28 U.S.C. § 753(b) have remained in effect since its enactment on January 20, 1944. More than 30 years ago it was common practice to eliminate the recording of the *voir dire*, as well as the opening statements and closing arguments. The legislative history on the subject is scanty, but in House Report No. 868, House Committee on the Judiciary, November 16, 1943, it is said, in explaining the duties of the court reporter: "The reporter shall be required to transcribe the original records of the *requested* parts of the proceedings, upon the request of any party to any proceedings *so recorded*, or upon the request of a judge of the court." (Emphasis supplied).

In light of past practices, the legislative history and Rule 10(c), Federal Rules of Appellate Procedure, we think it clear that the procedure followed by this circuit in *Brown v. United States, supra,* is proper, rather than adopt a *per se* rule of reversal.[5]

None of the authorities heretofore discussed involve any question of waiver.

The Waiver Issue

The Government draws a comparison between the waiver in this case with the waiver of a trial by jury under the Sixth Amendment. The analogy is inapposite. Under the Sixth Amendment there is no express reference to a waiver. It merely states that "the accused shall enjoy the right" to a trial by jury. The Constitution does not mandate a jury trial. *Adams v. U. S. ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942). Clearly, the "right" to a jury trial may be waived if the waiver is voluntary and knowledgeable.

In *United States v. Murray*, 352 F.2d 397 (4 Cir. 1965), defendant's counsel, assertedly without knowledge of defendant, agreed that the testimony need not be recorded in a nonjury case tried in the district court involving a parking violation of Government property where the maximum fine was $50.00. In con-

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[5]There is a line of cases holding that a statutory requirement may be considered directory and not mandatory. *Holbrook v. United States*, 284 F.2d 747 (9 Cir. 1960), but we have avoided this point as substantially all authorities relating to recording proceedings in criminal cases have held that the statute, 28 U.S.C. § 753(b), is mandatory.

sidering the waiver of the requirements of the Court Reporter Act, 28 U.S.C. § 753(b), the court said:

> But we think that in a case involving a mere parking violation where the defendant is represented by an attorney who agrees with the United States Attorney that the testimony need not be recorded, the infraction is as slight as the law ever notices and hardly can be said to rise to the gravity of a "crime" within the spirit of the Court Reporter Act.

Footnote 6 in *Murray, supra,* pointedly suggests that in none of the cases cited where the requirements of the Court Reporter Act were said to be "mandatory" was there any agreement to waive the provisions.

Our research has, however, disclosed at least one instance of waiver of recording in criminal cases. In *Addison v. United States,* 317 F.2d 808 (5 Cir. 1963), *cert. denied,* 376 U.S. 905, 84 S.Ct. 658; 11 L.Ed.2d 605, Chief Judge Tuttle, writing for the court, had this to say:[6]

> We now repeat what we stated in the Strauss opinion [*Strauss v. United States,* 311 F.2d 926 (5 Cir. 1963)]—
>
> There is no excuse for a court reporter's failure to comply with the requirements of the statute, *unless the party waives the requirement.* (Emphasis supplied).

[6]In *Addison,* appellant criticized the failure of the court reporter to record the oral arguments of counsel. The trial court granted the Government's motion to supplement the record. At the hearing it developed that counsel had told the court reporter that they did not wish to have him report the oral arguments.

Appellant's retained counsel—not having been retained trial counsel—urges the necessity of the complete transcript, including final arguments, for the reasons stated in *Hardy v. United States,* 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964). Reliance upon *Hardy* is misplaced. That involved an indigent defendant and equality of justice was at issue.[7] Even Mr. Justice Douglas, writing for the court, did not suggest that every transcript on appeal should contain the *voir dire* selection, opening statements and closing arguments of counsel. Indeed, he seemed to limit the transcript by saying:

> We conclude that this counsel's [newly appointed counsel on appeal] duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury as well as the testimony and evidence presented by the prosecution.

It is our view that, as a general rule, errors and irregularities that are not jurisdictional can be waived in criminal cases. The fact that 28 U.S.C. §753(b) is mandatory does not create a jurisdictional question when the court reporter fails to record certain proceedings. While the public has an interest in the life and liberty of a person charged with crime, the primary purpose of the statute at issue was to confer private rights on the parties to protect the record

[7]See the concurring opinion of Mr. Justice Goldberg who stated: "I conclude, therefore, that the interests of equal justice and the viability of our adversary system are impaired when an indigent defendant's access to a trial transcript is not as complete as that of a paying defendant." In the present case the appellant had retained counsel on the trial and appellate level.

in the event of an appeal. Nor do we think that this is the type waiver which requires the personal consent of the defendant. It was a procedure in the regular course of a trial which defendant's counsel was charged with the responsibility of deciding. It is somewhat analogous to a situation in which the prosecution presents clearly inadmissible testimony to which defendant does not object, for tactical reasons or otherwise. Indeed, in the present case defendant's trial counsel may have felt that he would have more leeway in his closing argument if it was not recorded. The fact that the prosecution may have taken advantage of the opportunity, while reprehensible, did not alter the fact that the recording of the closing arguments could be legally waived by counsel.

There are many other rights granted to defendants in criminal cases, some of which are worded in the form of "rights" and others by the language of the Constitution, statute or Federal Rules of Criminal Procedure without reference to "rights." Among these rights or provisions are the right of counsel, the privilege of immunity from self-incrimination, the right to a preliminary hearing or examination, an indictment by a grand jury, the right to a public trial, the right to service of a copy of the indictment or information upon the accused, the right to be arraigned, the right to time to prepare for trial, the right to be tried in the district in which the offense was committed, the right to challenge a juror for disqualification, the right to a full number of jurors, the right to be confronted by witnesses and have them exam-

ined, the right to poll the jury, the guaranty against double jeopardy, the guaranty against delay in the imposition of sentence, and, until the passage of the Speedy Trial Act of 1974 (under certain conditions), the right to a speedy trial. These, and a panoply of other rights conferred by the Constitution, the statutes, and the Federal Rules of Criminal Procedure, have been declared waivable, although in some instances the personal signature or express statement of the defendant is required.

The appellant was, of course, present at the time his trial counsel waived the recording of the final arguments. He made no objection at that time.

We hold that the action of appellant's trial counsel constituted a waiver by defendant of the mandatory provisions of 28 U.S.C. § 753(b).[5]

Harmless Error

While we would ordinarily direct that this case be remanded for compliance with Rule 10(c), Federal Rules of Appellate Procedure, in accordance with *Brown v. United States, supra,* the fact that appellant waived the requirements of 28 U.S.C. § 753(b) makes it unnecessary to take this action. This is precisely what happened in *Addison v. United States, supra,* where the case was remanded and it developed that counsel had advised the court reporter that it was unnecessary to report the oral arguments. In the

[5]In *United States v. Sigal*, 341 F.2d 837 (3 Cir. 1965), an implied waiver by the conduct of counsel was upheld where there was no recording of the *voir dire* examination of jurors which was attended by the defendants and their counsel (Biggs, C. J., dissenting).

present case, the record adequately demonstrates that counsel waived the recording of closing arguments.

If we accept appellant's contention as to the statement made by the prosecutor during closing argument, we nevertheless believe that it was harmless error which, upon objection, was promptly sustained. The fact that no cautionary instruction was given or requested is not of significance. Certainly, in the light of no request for a cautionary instruction can we expect a court, under ordinary circumstances, to interrupt the argument of counsel and act on its own motion. Moreover, the giving of a cautionary instruction frequently unduly emphasizes the objectionable argument.

Supervisory Powers

The final result in this case does not reflect any approval of the trial judge's action in suggesting to counsel that they waive the recording of closing arguments.[9] In the exercise of our supervisory powers,

[9]Probably what prompted the district judge to request the waiver is due to the antiquated procedure in the Western District of Washington where the court's charge to the jury precedes the final argument of counsel. The district judge, realizing that the court reporter was overloaded with work, probably wished to make more time available to him for other duties. Despite this effort of cooperation, we condemn the procedure. Had the charge followed the arguments of counsel, the court reporter would probably have had occasion to record the arguments. Rule 29.1, Federal Rules of Criminal Procedure, provides: "After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal." While there is no other statute or rule specifying the sequence of closing arguments and the court's charge to the jury, essentially all other districts follow the procedure of first permitting the closing arguments to be followed by the charge to the jury. This also permits the court to correct any obvious errors in the closing arguments.

we suggest that court reporters be required to record (but not transcribe unless requested for appellate purposes) the *voir dire* examination of jurors, the opening statements of counsel, and the closing arguments, as well as any bench conferences when requested by the court or counsel. These matters are as much a part of the proceedings in criminal cases as are the testimony of witnesses, the rulings of the court, the motions and objections of counsel, etc. In short, anything that transpires in *open court,* with the possible exception of the reading of a deposition, should be recorded by the reporter. Local practice cannot alter the statute.

Other Errors Assigned

1. Appellant urges that the *voir dire* examination was wholly inadequate. Initially, it should be noted that counsel are provided with a list of the prospective jurors which gives their names; places of residence; age; marital status; education; present and former occupations and names of employers; same information as to spouse; prior court experience as a juror or litigant; and whether the juror or close relative has ever worked for a law enforcement agency. Assuredly, there was no reason for the court, on its own motion, to repeat questions along these lines. The court read the indictment to the veniremen; counsel for each party were introduced, as well as the defendant, to ascertain whether any juror knew them; inquired as to their knowledge of the case; whether any juror harbored any bias for or against government agents as witnesses or any bias

because of the nature of the charge; the probable length of the trial; and individually inquired as to those jurors related to law enforcement work.

At the conclusion of the court's *voir dire* examination, counsel were asked if either had any additional questions. Appellant's trial counsel replied "I have none." In all respects the court complied with Rule 24(a), Federal Rules of Criminal Procedure.

The assigned error is frivolous and does not merit further discussion. Nor is there any merit to the contention that the failure of trial counsel to probe further by directing additional questions for the court to propound even begin to suggest the denial of effective assistance of counsel. It was Monday-morning quarterbacking at best.

2. As to Count II, the appellant contends that the Court's instruction failed to properly define the word "acquire" with respect to the violation of 18 U.S.C. § 542. In short, appellant argues that he did not "acquire" the Mercedes automobile in Canada, in the sense that *title* to the vehicle was not taken by him in that country. The indictment (Count II) does not use the word "acquire", but charges the appellant with making a false statement that "he was not *bringing* any merchandise with him into the United States from Canada."

There was no requested instruction on this point; nor was there any objection to the charge as given. Under no circumstances can this be regarded as plain error and, in the absence thereof, the appellate court

cannot consider same. Moreover, appellant was given concurrent sentences on Counts I and II.

3. Appellant suggests that Counts I (smuggling, 18 U.S.C. § 545) and II (the entry of imported merchandise into this country by means of false statements, 18 U.S.C. § 542) are the same. We think that there is no need to consider this matter further. As to Count I (smuggling) there need be no proof of any false statement or that the defendant knew the statement was false, which were essential elements for a conviction under Count II. The fact that a single act or transaction occurs is not material where different proof is required for each offense. *United States v. Beacon Brass Co.*, 344 U.S. 43, 45, 73 S.Ct. 77, 97 L.Ed. 61 (1952).

Viewing the record as a whole, we feel that the appellant had a fair trial and was represented by competent trial counsel. Let the mandate issue forthwith.

AFFIRMED.

Appendix C

United States District Court
for the
Western District of Washington at Seattle

No. CR76-22M

United States of America
vs.
Stanley Jerry Piascik

[Filed Aug. 11, 1976]

On this 11th day of August, 1976 came the attorney for the government and the defendant appeared in person and[1] with his counsel, Alan Froelich, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty, and a jury verdict of guilty of the offenses of violation of Title 18, United States Code, Section 545 as to Count I; violation of Title 18, United States Code, Section 542 as to Count II; and violation of Title 18, United States Code, Section 2312 as to Count III, as charged[3] in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that as to Count I of the Indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of' ONE (1) YEAR.

IT IS ADJUDGED that as to Count II of the Indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR.

Said sentence on Count II, to run concurrently with sentence on Count I.

IT IS ADJUDGED that as to Count III of the Indictment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR. The execution of said sentences as to Count III only is hereby suspended and the defendant placed on probation for a period of FIVE (5) YEARS, upon the following terms and conditions:

1. That he obey all federal, state, and local laws; and

2. That he abide by the rules and regulations of the Probation Office.

Said sentence on Count III, to run concurrently with sentence on Count I and Count II.

IT IS ADJUDGED that the execution of sentence is hereby stayed until September 1, 1976, at 9:00 a.m.,

at which time defendant shall present himself to the United States Marshal, 300 U.S. Courthouse, Seattle, Washington.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.
Presented by:

/s/ Walter J. McGovern
Walter J. McGovern
United States District Judge

/s/ Jerald E. Olson, AUSA
for Peter K. Mair, AUSA

The Court recommends commitment to:[6]

....., Clerk.

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[1]Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is other discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

No. 77-588

In the Supreme Court of the United States

OCTOBER TERM, 1977

STANLEY JERRY PIASCIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 559 F. 2d 545.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1977. A petition for rehearing was denied on September 22, 1977 (Pet. App. A). The petition for a writ of certiorari was filed on October 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction must be reversed because the court reporter, with petitioner's consent, did not record the closing arguments at trial.

2. Whether the district court's instructions to the jury improperly deprived petitioner of a defense.

3. Whether petitioner's convictions of both introducing imported merchandise into the commerce of the United States by means of a fraudulent declaration, in violation of 18 U.S.C. 542, and smuggling, in violation of 18 U.S.C. 545, violated the Double Jeopardy Clause.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of smuggling, in violation of 18 U.S.C. 545 (Count I), fraudulently introducing imported merchandise into commerce, in violation of 18 U.S.C. 542 (Count II), and transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. 2312 (Count III). He was sentenced to one year's imprisonment on each count, the sentences on Counts I and II to be served concurrently. Execution of the sentence imposed on Count III was suspended and petitioner was placed on probation for five years (Pet. App. C). The court of appeals affirmed (Pet. App. B).

The evidence at trial showed that on June 20, 1975, petitioner rented a Mercedes-Benz automobile in Stuttgart, Germany, identifying himself as Edwin Middleswart, a United States citizen whose passport petitioner previously had stolen (Tr. 6, 8-10, 30-31).[1] Three days later petitioner falsely notified the rental agency that the automobile had either been stolen or towed away in Hamburg (Tr. 34-35). On June 25, petitioner executed a fraudulent bill of sale for the car, setting forth a sale from "Gerhardt Breitkopf" to

[1]"Tr." refers to the transcript of petitioner's trial.

"Richard Meissner" (Tr. 319). Using overseas registration forms, petitioner then registered the automobile in New York in the name of Richard Meissner and placed New York license tags on the car in Europe (Tr. 125-127).[2] After composing a fictitious letter from Meissner authorizing Middleswart to drive the Mercedes-Benz (Tr. 127-128), petitioner, posing as Middleswart, drove the car to Denmark, where he arranged for its shipment to Canada (Tr. 131, 188-189).

The stolen automobile arrived in Montreal on August 24, 1975, and was transported by rail to Vancouver (Tr. 131-132, 188-189). On October 6, 1975, petitioner, again using the name Middleswart, obtained the car and cleared it through Canadian customs (Tr. 102-105, 266-267). He then drove it to the United States port of entry at Blaine, Washington, where he was asked by an immigration officer if he was returning with anything that "he had acquired outside the United States." Petitioner's response was negative (Tr. 109-111). During a thorough follow-up interview with customs officers, petitioner again stated that he had brought nothing with him from Canada and repeatedly asserted that he had acquired the automobile in New York (Tr. 112, 120-123, 163).

As Customs Inspector Donald Morrison was checking the car's engine, he noticed that it did not have an emission control sticker that was required for all automobiles imported into the United States after 1968 (Tr. 124). This led the inspector to conduct a more thorough search of the car, which produced Middleswart's passport and driver's license, the shipping papers, the registration in the name of "Richard Meissner," the false

[2]Petitioner previously had registered a different automobile in New York while overseas (Tr. 315-317).

letter of authorization, an airplane ticket in the name of Middleswart, and other incriminating materials (Tr. 124-134, 145). Petitioner was then arrested.

ARGUMENT

1. Petitioner contends (Pet. 10-14) that his conviction must be reversed because the court reporter did not record trial counsel's closing arguments, arguably in violation of 28 U.S.C. 753(b).[3] This claim was correctly rejected by the court of appeals, which concluded that, although the recording requirement of Section 753(b) is mandatory and includes within its scope the opening and closing arguments of counsel, petitioner knowingly and voluntarily accepted the trial court's suggestion to waive the recording of closing arguments in this case (Pet. App. vii to xi).[4] The court below determined that Section 753(b) was enacted primarily "to confer private rights on the parties to protect the record in the event of an appeal" (*id.* at ix-x) and accordingly that petitioner's counsel's tactical decision not to object—perhaps in the hope "that

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[3]28 U.S.C. 753(b) provides in pertinent part:

> One of the reporters appointed for each such [district] court * * * shall record verbatim * * * (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary * * *.

[4]The waiver of recording was agreed upon in the following colloquy (Pet. App. iii):

> THE COURT: * * *
>
> Now, Mr. Mair and Mr. Froelich, do you both agree to waive the reporting of your closing statements?
>
> MR. FROELICH: The defense does.
>
> MR. MAIR: I do.
>
> THE COURT: Very well.

he would have more leeway in his closing argument if it was not recorded" (*ibid.*)—constituted an effective waiver of this non-jurisdictional, statutory requirement. See *United States* v. *Sigal*, 341 F. 2d 837, 839-840 (C.A. 3), certiorari denied, 382 U.S. 811; *Addison* v. *United States*, 317 F. 2d 808, 811 (C.A. 5), certiorari denied, 376 U.S. 905.[5] The court's finding of waiver is clearly supported by the record and does not warrant further review.[6]

There also is no merit to petitioner's alternative claim that the court of appeals was compelled by its decision in *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9), to remand the case to the district court for a hearing to determine whether petitioner had been prejudiced by the failure to record. Petitioner's allegation of error related to government counsel's posing a hypothetical question during closing argument that was based upon the report of a handwriting expert that had not been admitted into evidence.[7] As the court of appeals noted, however,

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[5]In the exercise of its supervisory power, however, the court of appeals suggested that court reporters henceforth be required to record everything that transpires in open court, including counsel's closing arguments (Pet. App. xii-xiii).

[6]Petitioner's assertion (Pet. 10-11) that *United States* v. *Upshaw*, 448 F. 2d 1218 (C.A. 5), certiorari denied, 405 U.S. 934, and *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10), hold that a violation of Section 753(b) automatically requires reversal is incorrect. In each case the court of appeals held that reporting omissions require reversal only where the court is unable to determine that the alleged, unrecorded errors were harmless. See *United States* v. *Alfonso*, 552 F. 2d 605, 619-620 (C.A. 5), certiorari denied, No. 77-90, October 3, 1977.

[7]In an affidavit submitted to the court of appeals, petitioner's appellate counsel stated that he had been informed that government counsel's closing argument included the following statement (Pet. 9):

> There are a lot of fraudulent written documents which you will see among the exhibits. A handwriting expert analyzed them and compared them with the handwriting samples of the accused. I

although a failure to record counsel's closing arguments normally would require remand to the district court, in accord with *Brown*,[8] for a reconstruction of the record pursuant to Fed. R. App. P. 10(c) and a determination whether the defendant had been prejudiced by the omission, there is no need to do so where, as here, the appellate court itself can conclude with assurance that the alleged error, even if accepted as true, was harmless. See *United States* v. *Snead*, 527 F. 2d 590, 591 (C.A. 4); *United States* v. *Upshaw*, 448 F. 2d 1218, 1224 (C.A. 5), certiorari denied, 405 U.S. 934; *Parrott* v. *United States*, 314 F. 2d 46, 47 (C.A. 10).[9]

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have the expert's letter here. What does he say about the handwriting of Mr. Piascik, who claims he is innocent? . . . Well, let's do it hypothetically. What if a handwriting expert said that he cannot exclude someone as the author of some forged documents even though that someone may have made an effort to disguise his handwriting during the sample taking! But if you want to find him innocent that's your privilege.

[8]The defendant in *Brown* failed to allege any error that had occurred during government counsel's unrecorded summation, instead contending (unsuccessfully) that the failure to record itself required reversal. Accordingly, the court of appeals was unable to make an immediate determination of harmless error and remanded the case to allow the defendant an opportunity to present claims of unrecorded, prejudicial error. 314 F. 2d at 295.

[9]Petitioner's contention (Pet. 14) that government counsel's allegedly improper statement may not be considered harmless is insubstantial. Even if petitioner's counsel's affidavit is accurate, government counsel did not directly reveal the contents of the handwriting report, but only based a hypothetical question on the report's findings. Moreover, the brief remark led to an immediate objection, whch was sustained (Pet. App. xii). Finally, as the government argued in the court of appeals, defense counsel's reference to the report during closing argument invited government counsel's rebuttal. In these circumstances, there is no reason for this Court to review the court of appeals' essentially factual conclusion that the remark did not contribute to petitioner's conviction.

2. Petitioner contends (Pet. 14-15) that a jury instruction to which he did not object improperly deprived him of a valid defense to two of the charged offenses. Specifically, petitioner asserts that his convictions for smuggling and fraudulently introducing imported goods into commerce were based upon the falsity of his statement to customs officers that he had not "acquired" property abroad. He claims that this statement was not fraudulent because his response had been justified by his belief that the term "acquired" connoted permanent possession, but that this defense was removed from the jury's consideration by the trial judge's definition of "acquired" in a manner inconsistent with petitioner's understanding of the term.[10]

The short answer to petitioner's contention is that the district court's definition did not preclude the jury from finding that petitioner reasonably believed the truth of his response. The court simply defined the term as commonly used; it did not instruct the jury that petitioner had lied to immigration and customs agents. The jury remained free to conclude that petitioner's subjective understanding of the term "acquired," although inconsistent with the accepted definition of the word, justified his negative response to the agents' questions and that he therefore lacked criminal intent. The court itself later underscored this distinction when it instructed the jury that a factually incorrect statement is not "false," within the meaning of the statutes involved, unless the declarant perceived it to be untrue (Tr. 554-6).

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[10]The district court instructed the jury that "[t]he verb 'acquired' means to come into possession, control or power of disposal" (Tr. 554-5). Defense counsel did not object to this instruction (Tr. 551).

3. Finally, petitioner contends (Pet. 15-16) that the Double Jeopardy Clause bars his convictions under 18 U.S.C. 542 and 18 U.S.C. 545 for the same act or transaction.[11] Petitioner acknowledges that the standard for determining whether two crimes are separate for double jeopardy purposes is "whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304. See also *Brown* v. *Ohio*, No. 75-6933, decided June 11, 1977, slip op. 5. That test is plainly satisfied here. As the court below found (Pet. App. xv), Section 542 requires proof that the defendant made a statement that he knew to be false, an element not required by Section 545. On the other hand, Section 545, as petitioner concedes (Pet. 16), requires proof of an intent to defraud the United States (see *United States* v. *Boggus*, 411 F. 2d 110, 113 (C.A. 9), certiorari denied, 396 U.S. 919; *United States* v. *McKee*, 220 F. 2d 266, 269 (C.A. 2)), as well as proof of clandestine introduction of goods into this country, facts that need not be shown under Section 542. See *United States* v. *Riddle*, 5 Cranch 311, 312. Thus, the two statutes are not the same for purposes of the Double Jeopardy Clause.

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[11]Petitioner received identical concurrent sentences for these offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
JOHN J. KLEIN,
Attorneys.

JANUARY 1978.

DOJ-1978-01

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-588

STANLEY JERRY PIASCIK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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Subject Index

Table of Authorities Cited

Statutes

est exclusio alterius,[1] and of the "presumption that a proviso 'refers only to the provision to which it is attached.'" *United States v. McClure,* 305 U.S. 472, 478, 83 L.Ed. 296, 59 S.Ct. 335 (1939).

Even if waiver of the provisions of the Court Reporting Act in a criminal case were possible, such a waiver would not constitute waiver of the right to object to prosecutorial misconduct. In this case "The unavailability of a full transcript makes it impossible for us to determine whether the errors were harmless . . ." *Parrott v. U.S.,* 314 F.2d 46, 47 (10 Cir. 1963), and it cannot be denied that if the prosecutor made the statement asserted in closing arguments, his act was clear misconduct. See *Berger v. U.S.,* 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). The Government suggests that it was proper for the Court of Appeals nonetheless to reach "an essentially factual conclusion that the remark did not contribute to petitioner's conviction." (Note 9, Respondent's Brief at 6). If reversal is not called for in this case, then such a factual conclusion should be made by the trial court on remand, and not by the Court of Appeals on an incomplete record.

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2. PROHIBITIONS AGAINST DOUBLE JEOPARDY AND DOUBLE PUNISHMENT WERE VIOLATED IN THIS CASE

As established in *Brown v. Ohio,* ..... U.S. ....., 97 S.Ct. 2221, ... L.Ed.2d ..... (1977), conviction of one

[1]See, *e.g., National Railroad Passengers Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453, 458, 38 L.Ed.2d 646, 94 S.Ct. 690 (1974).

offense precludes conviction of either a lesser-included or greater offense, and precludes conviction of any other offense unless "each statute requires proof of an additional fact which the other does not." 97 S.Ct. at 2226. (Emphasis added.) It is not disputed that in the present case the "concealment" consisted of the petitioner's failure to state that he had acquired the Mercedes abroad. Consequently, having proven its case with respect to the "smuggling" charge (18 USC 545), the charge of "entry of goods by means of false statements" did not "require proof of an additional fact." Conviction of violation of both 18 USC 542 and 18 USC 545 was therefore improper.[2]

---

3. OTHER MATTERS RAISED IN THE PETITION ARE HEREIN REAFFIRMED

Petitioner reaffirms the statement of the case and argument in the petition with respect to matters not otherwise discussed in this brief. In omitting further argument petitioner is constrained by Rule 24's requirement that reply briefs be limited to matters first raised in the briefs in opposition; as the Government's remaining assertions are insubstantial or depend only upon a record which speaks for itself, they require no reply.

[2]There is a typographical error in the third to last line on page 15 of the petition which might lead to confusion. On that line, "18 USC Sec. 542" should be replaced by "18 USC Sec. 545."

CONCLUSION

For the foregoing reasons, the writ should be granted and the decision of the Ninth Circuit Court of Appeals reversed, with this Court granting the remedies requested in the petition.

Respectfully submitted,

EPHRAIM MARGOLIN,

Attorney for Petitioner,

Stanley Jerry Piascik.

Dated: February 6, 1978.